



U.S. Department of Housing and Urban Development  
Community Planning and Development

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Special Attention of:

**Notice:** CPD 96-05

All Secretary's Representatives

All State/Area Coordinators

All CPD Division Directors

All CDBG Entitlement Grantees

All HOME Coordinators

All HOME Participating Jurisdictions

Issued: October 11, 1996

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Cross Reference: 24 CFR Parts 570 & 92

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**Subject: Procurement of consulting services by Community Development Block Grant (CDBG) recipients, HOME participating jurisdictions, and subrecipients**

## **PURPOSE**

The purpose of this Notice is to provide information and guidance to Community Development Block Grant (CDBG) program recipients, HOME participating jurisdictions, and subrecipients (and for States that have adopted the Federal regulations on procurement referred to herein) on the procedures that should be followed to ensure proper procurement of goods and services. The Notice places particular emphasis on the procedures to be followed to ensure that professional service providers or consulting services are properly procured.

## **BACKGROUND**

An audit report issued by the Office of Inspector General (OIG) in March 1994, found a variety of deficiencies in the procurement of consulting services by CDBG recipients. Among the problems identified in the procurement of such services were that (1) cost analyses were not being performed, (2) competition was often not free and open, (3) contract services were being paid for before the contract was signed or after the contract had expired, (4) work required under contracts often was not properly performed or delivered, and (5) maintenance of a contract administration system was often lacking.

As a result of this audit, the OIG recommended that the Office of Community Planning and Development issue a Notice to CDBG recipients and subrecipients on the need for compliance with the applicable CDBG procurement regulations with respect to the procurement of consulting services.

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~~DGBE: Distribution: W-3-1, Special (All CDBG Entitlement Grantees: all HOME Participating Jurisdictions)~~

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The use of contracted services, including consulting services for professional assistance in program planning, development of community development objectives, and other general

<sup>1</sup> For existing guidance on distinguishing between the use of procurement contracts and subrecipient agreements as a means of carrying out eligible CDBG activities, recipients and subrecipients should refer to HUD's Guidebook for Grantees on Subrecipient Oversight - Managing CDBG, which is part of HUD's Subrecipient Management Training materials issued August 1993. For guidance in carrying out eligible HOME activities, HOME participating jurisdictions should refer to 24 CFR 92.504 and 92.505.

professional guidance relating to program execution, is eligible under the CDBG program at 24 CFR 570.200(d) and authorized under the HOME program at 24 CFR 92.505 by reference to the applicable uniform administrative requirements. For both programs, 24 CFR 85.36 is the authority for local governments (and States that have chosen to follow the regulations) to use when procuring consulting services under an independent contractor relationship, as provided at 24 CFR 570.502(a)(12) for CDBG and 92.505(a) for HOME. 24 CFR part 84 is the authority for non-governmental subrecipients, as stipulated at 24 CFR 570.502(b) and 92.505(b), respectively.

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Consulting services are an important resource available to CDBG grantees/HOME participating jurisdictions and their subrecipients to obtain professional assistance to plan and implement CDBG/HOME activities. However, the solicitation of these services should be prefaced by as much planning and preparation as possible, including identifying the use of consulting services in the recipient's consolidated plan, thereby subjecting it to the citizen participation process. The result will be procurement activities for which a more comprehensive and thoughtful procurement agenda exists and for which adequate funds are more likely to have been budgeted.

Following completion of the planning and budgeting process, recipients and subrecipients may wish to issue a public notice of procurement needs identifying general and specific activities under which consulting services may be required. The issuance of the notice sets in motion a process of early notification to potential providers of consulting services. By requesting qualifications of potential providers to carry out work in the areas specified, the notice can lead to the receipt of information that can be used to start a database of potential consultant providers.

While consulting services procured under the CDBG/HOME programs are governed by the procurement requirements noted above, these regulations permit recipients and their subrecipients to use their own procurement procedures (reflecting appropriate State and local laws and ordinances), as long as those procedures meet the standards identified in these regulations.

## **SECTION I. COMPETITION AND STANDARDS OF CONDUCT**

The procurement of consulting services places the utmost importance on a process that is fair and unbiased in every respect. A major opportunity to achieve this objective is ensuring in all procurement transactions the presence of full and open competition and the absence of conflicts of interest.

### **A. Full and open competition**

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<sup>2</sup>In the text, where possible, applicable regulatory language is included in italicized print. As Part 85 is more descriptive than Part 84, it may be useful to non-governmental entities seeking more information on a given procurement subject matter.

To help ensure that consulting services are procured in a manner that is fully and openly competitive, the procurement of consulting services shall be conducted in a manner that provides full and open competition. 24 CFR 85.36(c)(1) identifies the following among the situations considered to be restrictive of competition:

- (i) *Placing unreasonable requirements on firms in order for them to qualify to do business,*
- (ii) *Requiring unnecessary experience and excessive bonding,*
- (iii) *Noncompetitive pricing practices between firms or between affiliated companies,*
- (iv) *Noncompetitive awards to consultants that are on retainer contracts,*
- (v) *Organizational conflicts of interest,*
- (vi) *Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and*
- (vii) *Any arbitrary action in the procurement process."*

Section 84.43, which covers the subject of competition for non-profit organizations, provides, in part:

*"All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition."*

Guidance for implementation:

Central to the efforts of recipients and subrecipients to obtain professional service providers to carry out eligible CDBG/HOME activities is ensuring that the procurement process is as free and open as possible. An adequate number of competing professional service providers must be part of the competitive process regardless of the method of procurement employed. The key to obtaining an adequate number of competing providers is an appropriate level of advertising. This can be best accomplished by advertising for professional service providers in widely circulated newspapers, trade journals and other sources including the use of a bidders list, if available, to ensure coverage of the marketplace.

Certain other considerations must be kept in mind to ensure the procurement of professional service providers is based on full and open competition. Unless stated in the solicitation documentation that the contract to be awarded calls for multi-year funding, contracts cannot be renewed or extended without further competition. Professional services which are to be provided for a longer period than originally procured must be readvertised. Recipients and subrecipients must also ensure, when procuring consulting services, that they do not use any firms included on HUD's Debarment and Suspension List, as provided at 24 CFR 570.609 of the CDBG regulations, 24 CFR 92.357 of the HOME regulations, and at 85.35 and 84.44(d). (The General Services Administration

issues a monthly publication, "The Lists of Parties Excluded from Federal Procurement or Non-Procurement Programs," that consolidates information from HUD and other Federal agencies on firms that are debarred and suspended. Information on subscription requirements may be obtained from GSA's Office of Acquisition Policy, (202) 501-4873.)

## **B. Conflicts of interest/standards of conduct**

24 CFR 85.36(b)(3) states, in part:

*"Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when: (i) the employee, officer or agent; (ii) any member of his immediate family; (iii) his or her partner; or (iv) an organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award."*

The regulations covering nonprofit entities at 24 CFR 84.42 state:

*"The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved."*

### Guidance for implementation:

Nothing is perhaps more detrimental to a successful procurement operation than to have the relationship between the recipient/subrecipient and the contractor questioned by real or apparent conflicts of interest. Conflicts may be personal, financial, or organizational. The professional services provider should be viewed as, and be in fact, an unencumbered provider of assistance in program planning, community development strategies and sources of other general and detailed guidance to the community. The integrity of the community development process and of those charged with carrying it out should not be sacrificed for something less than the highest standards of conduct. Nothing is more important than to ensure that the professional service provider is an independent party above any suspicion of having a real or apparent conflict of interest.

The concern about avoiding any appearance of a conflict of interest extends to those cases where one is to conduct business with organizations whose board members may have relationships with personnel of the recipient or subrecipient that may cause a real or apparent conflict of interest. It goes without saying that it will be most important that those responsible for ensuring the integrity of the process exercise the utmost in good judgment when faced with such situations. Often, the only solutions to such situations is for the personnel of the recipient or subrecipient to abstain from any decision-making that

would directly, and perhaps indirectly, impact on the final selection of the professional service provider.

(NOTE: The conflicts of interest discussed here pertain to conflicts under the procurement regulations in Parts 84 and 85. The CDBG and HOME conflict of interest regulations at 24 CFR 570.611 and 92.356, respectively, pertain to all non-procurement cases not covered by Parts 84 and 85.)

## **SECTION II. METHODS OF PROCUREMENT**

Recipients and subrecipients may use different methods of procurement to obtain consultant services.

### **A. Requests for proposals**

24 CFR 85.36(d)(3), Procurement by competitive proposals, provides that *"the technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:*

- (i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;*
- (ii) Proposals will be solicited from an adequate number of qualified sources;*
- (iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;*
- (iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered."*

24 CFR 84.44 provides that nonprofit recipients *"shall establish written procurement procedures. These procedures shall provide for, at a minimum,"* that the following criteria apply:

- (1) "Recipients avoid purchasing unnecessary items.*
- (2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government.*
- (3) Solicitations for goods and services provide for all of the following:*
  - (i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements,*

*such a description shall not contain features which unduly restrict competition.*

- (ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.*
- (iii) A description, whenever practical, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.*
- (iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.*
- (v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.*
- (vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient."*

Guidance for implementation:

The competitive proposals method of procurement is the preferred method to use when procuring consulting services. Under this method, a request for proposals (RFP) is prepared containing a statement of work that details the procurement requirements needed by the recipient or subrecipient. The request for proposals must clearly and accurately state selection criteria against which all responding proposals will be evaluated.

If an adequate number of professional service providers respond to the RFP, a qualified panel will review the proposals against factors for award identified in the RFP. This requirement that each proposal must first be evaluated against the selection criteria noted in the RFP is a distinctive characteristic of this method of procurement, where no public disclosure of the contents of offerors' proposals is made on the final date of receipt, as is done with sealed bids.

In its evaluation, the panel should use a competitive range procedure to establish a ranking order of successful proposals which may lead to a determination of whether oral discussions (negotiations) should be held with service providers that fall within the competitive range<sup>3</sup>, or if the contract should be awarded to the top offeror in the range. If discussions are held, "best and final offers" are requested and re-scored with the best of the best selected as the winner of the competition, subject to negotiation of a fair and reasonable price.

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<sup>3</sup>The competitive range will include those consultant firms who, after a scoring of their proposals, appear to have the greatest potential to satisfy the terms and conditions of the RFP. Usually these consultants will be invited to an oral discussion and asked to submit, subsequent to such discussion, a "best and final offer."

After proposals are reviewed by the panel against the evaluation criteria (a combination of cost and price factors) in the RFP, written results of the reviews must be maintained as part of the documentation of the procurement process. If requested, the recipient or subrecipient should debrief or notify unsuccessful offerors of the winner and the conclusion of the procurement process.

## **B. Small purchases**

24 CFR 85.36(d)(1) provides for procurement by small purchase procedures. *"Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies or other property that do not cost more than \$100,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources."*

Unlike 24 CFR 85.36(d)(1), the regulations at 24 CFR 84 do not specifically identify small purchase procedures as an eligible method of procurement. However, such eligibility is implicit in the language at 24 CFR 84.44(e)(2), which provides that when *"[T]he procurement is expected to exceed \$100,000 or the small purchase threshold fixed at 41 U.S.C. 403(11) whichever is greater..."*, recipients shall, on request, make available for the Federal awarding agency, certain pre-award review and procurement documents.

### Guidance for implementation:

Consultant services may be procured using small purchase procedures when the procurement will not cost more than the simplified acquisition threshold of \$100,000 in the aggregate. As noted in the above 24 CFR 85.36(d)(1) citation, it is necessary to obtain price or rate quotations from an adequate number (i.e., three to five) of qualified sources. To obtain rate and price quotations vendors can be phoned and their names, addresses and price or rate quotations should be recorded. The vendors whose solicited information is the most responsive to the item being procured should be issued a purchase order. Catalogues or price lists may also be used. It is important that the relatively smaller dollar amounts associated with small purchases and the informal nature of this procurement method do not create a climate in which the emphasis on full and open competition is diminished.

By virtue of the higher dollar threshold for small purchases (compared to a previous threshold of \$25,000) established under Parts 85 and 84, it is expected that most recipients and subrecipients will substantially increase the level of procurement of consulting services using small purchase procedures. In this regard, procuring parties should be advised that if small purchases with the higher dollar threshold become complex, it may be advantageous to use a written solicitation and to request written responses from potential providers of consultants' services.

## **C. Sealed bids**

24 CFR 85.36(d)(2) provides for *"Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is*

*awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction" services.*

24 CFR 84.44 does not include a provision that specifically addresses the use of sealed bids. It does, however, make frequent use of the terms "*bid*" and "*bidder*" in discussing competition, procurement procedures and contract provisions.

**Guidance for implementation:**

Because of the nature of the services provided by most consultants, the sealed bid method of procurement is not the preferred method to use in procuring such services.

Where the occasion arises for its use, this method of procurement must involve use of a public solicitation (e.g., issuance of an invitation for bid (IFB)) with specifications to be responded to that are not overly restrictive. Award is to be made to the most responsive and responsible bidder whose bid conforms in all the material terms and conditions to the IFB and is the lowest in price.<sup>4</sup> Selection of a consultant can be principally made on the basis of a firm, fixed price (lump sum or unit price).

**D. Use of non-competitive procedures**

*In accordance with 24 CFR 85.36(d)(4), "procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:*

- (A) The item is available only from a single source;*
- (B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;*
- (C) The awarding agency authorizes noncompetitive proposals; or*
- (D) After solicitation of a number of sources, competition is determined inadequate.*

*Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required."*

24 CFR 84.44 does not include a provision that specifically addresses the use of noncompetitive procedures. However, it does provide at 84.46, Procurement Records,

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<sup>4</sup> 24 CFR Part 84 procurement regulations refer to the term lowest bid in a discussion that allows a grantor agency or authority to request pre-award reviews and procurement documents where other than the "apparent lowest bidder" will be the beneficiary of the procurement. Therefore, where the apparent low bidder is not awarded the contract, the procuring entity should document its application of cost reasonableness, as provided in OMB Circular A-122, in the procurement of consulting services.



that *"procurement records and files for purchases in excess of the small purchase threshold shall include, at a minimum:*

*(b) Justification for lack of competition when competitive bids or offers are not obtained."*

Guidance for implementation:

It is important that ample support and justification exist for the use of the noncompetitive method of procurement. Events that require efficiency in the procuring of services (e.g., an untimely event occurs that may be judged a crisis) may lead to initiating a one and only contractor selection process and awarding the contract to that firm. However, such a situation could be handled by simply shortening the procurement period rather than eliminating it. Another example is when a contract runs out that does not contain a provision calling for work for more than one year. The contract is renewed to the same contractor without competition on the belief that the renewal is justified because of the experience accumulated by the contractor in the subject area of work or because of the perception that a new procurement initiative would be no more than an exercise with the current contractor being selected anyway. If there is no provision for extending the contract, a provision that would have been made known to all parties in the solicitation document, the preponderance of odds seemingly favoring one contractor is not an adequate basis on which to justify the exclusion of potential providers of consulting service from the right to compete. (Note: with respect to item C above, awarding agency means HUD, the grantee, HOME participating jurisdiction or subgrantee.)

Additional information on conducting a cost analysis is provided in Section V.

**E. Architectural & engineering services**

24 CFR 85.36(d)(3)(v) provides that *"grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort."* 24 CFR 84.44 does not include a provision that specifically addresses the procurement of A/E services.

Guidance for implementation:

As noted above, recipients and subrecipients have the choice of issuing a Request For Proposal (RFP) or soliciting qualification-based statements. When the choice is to issue a RFP, the guidance discussed under Section II(A) should be followed. In addition to the guidance, maps and site locations and starting and ending dates should also be made available to A/E service providers if this kind of information is critical to the development of proposals. Of course, where A/E services will be used for construction projects, it is advisable to schedule pre-bid construction conferences to discuss the project, wage rates, responsibilities, on-site monitoring procedures and other pertinent subjects.

Where the grantee or subgrantee decides to request A/E qualifications, the qualification statements received should be reviewed and ranked by a qualified panel or board. The most qualified A/E service providers can be asked to submit requests for proposals or the most qualified can be selected and negotiation with the selectee can begin immediately.

Under qualifications-based procurement of A/E consultant services, four points are to be remembered: (1) qualifications-based procurement may only be used in procuring A/E professional services; (2) price is not an initial selection factor; (3) geographic preference may be used as a selection factor if adequate competition (i.e., 2 or more offerors who are responsive and responsible) exists within an area; and (4) state laws governing the procurement of architectural and engineering services may vary, so recipients should be careful to understand the laws in their respective states.

#### **F. Employee/employer relationship (24 CFR 570.200(d)(1))**

Consultant services provided under an employee/employer relationship are not governed by the procurement requirements of Part 85 or Part 84.

Rather, under the CDBG program, obtaining consultant services under this procedure is authorized at 24 CFR 570.200(d)(1). (Until such time as the HOME regulations are revised to address consultant services under an employee/ employer relationship, HOME participating jurisdictions should follow the procedure established for the CDBG program.) Recipients and subrecipients must follow their own formal personnel policies and procedures in obtaining consultant services under this provision of the regulations. When using this procedure, the consultant (1) would have a description of his or her duties (position description), (2) would be supervised by the recipient or subrecipient, and (3) would be subject to the normal periodic interaction that takes place between an employee and his or her supervisor. Standard personnel policy for selecting individuals to fill positions include the development of a position, writing of the duties of the position, advertising the position, reviewing and rating of applications, and selection for the position. Where CDBG or HOME funding is being used to pay the salary of the person occupying the position in whole or in part, for purposes of determining the length of stay in a position before it is re-advertised, the standard that shall apply is a maximum of three years from the date the contract is signed. (Note: This 3-year standard is used by HUD irrespective of the recipient or subrecipient using personnel agreements or contracts.)

No person providing consultant services in an employer-employee type of relationship can receive more than a reasonable rate of compensation paid with CDBG or HOME funds for personal services, and in no event can the amount of compensation in an employee/employer relationship exceed the maximum daily rate of compensation for Level IV of the Executive Schedule (ES) as established by Federal law.

### **SECTION III. CONTRACT CLAUSES AND BIDDERS LIST**

#### **A. Contract Clauses**

Refer to 24 CFR 85.36(i) or 84.48, as applicable, for those clauses to be included in the contract type associated with the above methods of procurement.

**B. Use of bidders list**

24 CFR 85.36(c)(4) states that *"grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period."* Further, 24 CFR 85.36(e)(2)(i) requires that qualified small and minority businesses and women's business enterprises are to be placed on solicitation lists.

24 CFR 84 does not specifically address the use of a bidders list. However, 24 CFR 84.43 states that *"all procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition."* Further, 24 CFR 84.44(b)(2) provides that organizations covered by these regulations shall *"make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises."*

Guidance for implementation:

The procurement of professional services must be accomplished under procedures that provide for full and open competition as has been stated throughout this Notice. The bidders' list can assist in the realization of that objective if used properly. Not meant to be read literally, the term bidders list is intended to refer to any properly developed database, classification or categorizing of potential professional service providers whose services may be solicited under any method of procurement. As with any special listing, a bidders list also affords recipients and subrecipients the opportunity to obtain information on the capabilities and the resources of providers. Such information can be critical for a purchasing operation to provide to operating departments timely and up-to-date information on vendors available to provide consulting services. These lists must be open and inclusive, and routinely updated and managed. For example, names should be purged from the list when found to be on the HUD debarment list or when no proposals or bids are received for a long time from list members to whom RFP's or IFB's have been mailed. Keep in mind that lists are not simply to be rotated; such usage has been judged by courts to be inconsistent with the full and open competition concept. The one exception to this, however, is in the case of small purchases where the practice of rotating names on the list is considered acceptable.

**SECTION IV. CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN'S BUSINESS ENTERPRISES AND LABOR SURPLUS AREAS FIRMS; COMPLIANCE WITH SECTION 3**

**A. Contracting with small and minority, women's business enterprises and labor surplus area firms**

24 CFR 85.36(e) addresses contracting with small and minority firms, women's business enterprise and labor surplus area firms and provides that *"the grantee and subgrantee will take all necessary affirmative steps to ensure that minority firms, women's business enterprises, and labor surplus area firms are used when possible. Affirmative steps shall include:*

- (i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;*
- (ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;*
- (iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;*
- (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;*
- (v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and*
- (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed above in (i) through (v)."*

As identified in paragraph B of Section III above, 24 CFR 84.44(b) requires that positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take the steps identified at 24 CFR 84.44(b)(1) - (5), which are identified below, to further this goal.

- (1) "Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.*
- (2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.*
- (3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.*
- (4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.*
- (5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business*

*Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises."*

Guidance for implementation:

Recipients and subrecipients should initiate actions to increase the opportunities for small, minority- and women-owned businesses to participate in the procurement process. Placing such businesses on lists, dividing total requirements, organizing procurement schedules, making information available encouraging small business consortiums and using the services of the Department of Commerce are among the identified actions or steps that are available. Some measure of aggressiveness or initiative must be put forth either directly or indirectly by recipients and subrecipients, or it is unlikely opportunities will open up for greater participation by the subject businesses. However, if none of the suggested steps are incorporated into the procurement activities of units of general local government or nonprofit organizations, it can be fairly concluded that any leveling of the playing field for opportunities for these firms will be quite limited.

A close look at the list of steps that can be taken shows them to be divided into those that can be directly controlled by the recipient or subrecipient, with others being done by prime or general contractors.

For example, in the RFP process, recipients and subrecipients can develop a points system in which extra points can be awarded to firms whose proposals include the use of minority- and women-owned businesses and labor surplus area firms as subcontractors. Additionally, databases can be developed that include such firms so that when a prime contractor indicates difficulty in locating minority- or women-owned firms, a list can be provided to him or her by the recipient or subrecipient from its database.

Each recipient/subrecipient is responsible for ensuring that general contractors are aware of their responsibility to use small, minority-owned and women-owned businesses. Similarly, those contractors are responsible for ensuring that their subcontractors are aware of the responsibility for compliance with this requirement and of the strategies that may be used to comply. In the previous section, it was noted that the use of the bidders list, for example, should be inclusive. In that regard, the list should be open to new firms at all times and can be helpful in the development of information on small, minority and women-owned businesses by the areas of specialty of these professional services providers.

**B. Section 3 Requirement of the Housing and Urban Development Act of 1968, as amended**

In accordance with the requirements under Section 3 of the Housing and Urban Development Act of 1968, as amended, recipients shall ensure that employment and other economic opportunities generated by the use of CDBG/HOME funds shall, to the greatest extent feasible, be directed to low- and very-low income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low- and very-low income persons. Section 3 covered

assistance includes the expenditure of CDBG/HOME funds for work arising in connection with housing rehabilitation, housing construction, or other public construction projects.

Section 3 requirements are applicable to all procurement actions in excess of the small purchase threshold established at 24 CFR 85.36(d)(1), regardless of whether the procurement is governed by 24 CFR 85.36. All Section 3 covered contracts and subcontracts (contracts and subcontracts awarded for work generated by the expenditure of Section 3 covered assistance, or for work arising in connection with a Section 3 covered project) in which the amount of assistance to the recipient exceeds \$200,000 and the contract or subcontract exceeds \$100,000 shall include the Section 3 clause.

## **SECTION V. CONTRACT COST AND PRICE**

In addition to the requirements for competitive procurement and maintenance of a written code of standards of conduct, those who procure consultant services must be prepared (1) to conduct a cost or price analysis and (2) to ensure that the contract price and profit are reasonable.

### **A. Contract cost and price**

#### **1. Cost and price analysis**

*24 CFR 85.36(f)(1) provides that "grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price."*

*24 CFR 84.45 states that "some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability."*

#### **Guidance for implementation:**

As provided in the regulations identified above, recipients and subrecipients must perform their own cost or price analysis for every procurement action for consulting services, including contract modifications or change orders. The method and degree of

analysis depends on the facts related to each procurement, but as a starting point, the recipient/subrecipient must make independent estimates before receiving bids or proposals.

- a. Price analysis is the process of examining and evaluating a proposed price without examining its separate cost elements and proposed profit. As price analysis is associated with the sealed bid method of procurement, which is not the preferred approach to procuring professional services, the need to conduct a price analysis for such services will be limited. However, where the need arises to conduct a price analysis for consulting services, approaches that can be used to determine if a proposed price is fair and reasonable include:
  - i. A comparison of the proposed prices received in response to the solicitation;
  - ii. A review of historical/previous prices proposed against current prices proposed for the same or similar items;
  - iii. A comparison with published prices or market prices;
  - iv. A comparison with internal, independent estimates;
  - v. A comparison of detailed price information to assess the overall price (which may involve use of cost principles as general guidance in determining price reasonableness).
- b. Cost analysis differs from price analysis in that it is the review and evaluation of the separate elements of cost and proposed profit, and the reasonableness of those estimated costs of performance. Cost analysis is necessary when cost or pricing data are required, as well as when adequate price competition is lacking (e.g., use of non-competitive procedures), for sole source procurements, or when price analysis alone is insufficient to ensure the proposed price is reasonable. Cost analysis is also required for contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. Approaches to cost analysis and ensuring that proposed costs represent accurate projections include:
  - i. Verification that costs submitted by the offeror comply with applicable cost principles, including that direct and indirect costs are allowable and allocable, as well as reasonable;
  - ii. A comparison of the offeror's proposed costs with internal, independent estimates;
  - iii. A comparison of historical/previous actual costs from the offeror, or previous cost estimates from the offeror or from other offerors, with the current/proposed costs for the same or similar items;
  - iv. A comparison of proposed cost items with published catalogue prices, market costs, etc.

In addition to evaluating such factual data on costs, cost analysis should also consider the judgmental factors used by the offeror to arrive at the estimated costs that were submitted, i.e., what judgmental factors and methods (mathematical or other) were used in projecting the data submitted in the proposal. This part of the cost analysis should ensure that the factual data presented reasonably reflects the need(s) identified in the solicitation.

In carrying out their responsibilities in the performance of price and cost analysis, recipients and subrecipients are to follow the provisions of OMB Circulars A-87 and A-122, as applicable.

## 2. Contract price and profit

In accordance with 24 CFR Section 85.36(f)(2), recipients and subrecipients will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see 24 CFR 85.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles. The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

24 CFR 84.44(c) states that the type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. Similar to Part 85, Part 84 provides, the "*cost-plus-a-percentage-of-cost*" or "*percentage of construction cost*" methods of contracting shall not be used.

### Guidance for implementation:

In accordance with the above requirements, recipients and subrecipients will negotiate profit as a separate element of the price for each consultant contract in which there is no price competition, and in all cases where a cost analysis is performed. To establish a fair and reasonable profit, it may be useful to establish a general range of profit for the work being done, with consideration given to the complexity of the work to be performed, the risk borne by the consultant, the consultant's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. If profit is shown as a percentage of cost relative to the work to be done, the recipient should review such amount and make adjustments, as needed, based on the factors identified above in this paragraph.



## SECTION VI. CONTRACT ADMINISTRATION

The procurement of contract services must provide for an overall system of contract administration to ensure proper post-award administration of each procurement action.

24 CFR 85.36(b)(2) states that grantees and subgrantees *"will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders."*

Similarly, for nonprofit organizations, 24 CFR 84.47 requires that *"a system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract."*

### Guidance for implementation:

Based on the above requirements for recipients and their subrecipients to maintain a system for contract administration, such a system should ensure the following:

1. That the method of procurement is documented and that such records are maintained for five (5) years after the final payment is made and the activity is listed on a recipient's annual performance report to HUD, and all pending matters are closed;
2. That all activities are carried out and all costs are incurred in compliance with requirements of 24 CFR Parts 570, 92 and 58;
3. Before payment is made, that services performed are adequate and consistent with the contract scope of services;
4. That performance is monitored periodically and the results of the reviews are included in the procurement record. Monitoring should include periodic reviews of tasks against deliverables, as well as a review of progress reports submitted by the consultant against the tasks and deliverables. It should also include a determination that the management systems contractually agreed to are still in place and functioning properly;
5. That contract modifications are justified and do not serve as a means to artificially increase the price of the award.

Recipients and subrecipients with questions concerning the content of this Notice should contact the Community Planning and Development Division in the appropriate HUD field office. HUD field offices with questions related to the CDBG program should contact the Entitlement Communities Division or the Financial Management Division in the Office of Block Grant Assistance, while questions from HUD field offices related to the HOME program should be directed to the Office of Affordable Housing Programs.